

CRIMINAL APPEAL No 535 of 1985

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 31/08/96

ORAL JUDGEMENT (per PANCHAL, J.)

By means of filing this appeal under S.378 of the Code of Criminal Procedure, 1973, State of Gujarat has challenged legality and validity of the judgment and order dated February 28, 1985 rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No.108/84, acquitting the respondents under S.302 read with S.34 of the I.P.Code.

2. In brief the prosecution case is that deceased Budha Chhota Rathva was residing at Talavdi Falia, Village Gatha, Taluka Halol togetherwith family members. On May 18, 1984, a feast was arranged at the house of Chima Manji and the deceased as well as his family members were also invited to participate in the feast. Respondent No.1 was serving the dinner. He did not serve meat to the deceased, but served only gravy. As a result of this, the deceased objected and an altercation took place. The family members of the deceased got up halfway while the dinner was being served and left the place. When the deceased togetherwith his family members was returning home, respondent no.1 caused injury to the deceased by pelting stone, as a result of which the deceased fell down in the field of Chatra Amara, and thereafter respondent no.2 caused injuries on the neck of the deceased by means of paliya whereas juvenile offender Metra Navalsing caused injuries on the back of the deceased by means of knife and respondent no.3 caused injuries to the deceased by means of stick. After assaulting the deceased, all the accused ran away. As the deceased had sustained bleeding injuries, he was removed to his house. Chunkiben, the wife of deceased Budha Chhota went to the Police Patel and narrated the incident. On the next day, i.e. on May 19, 1984, the deceased went to Shivrajpur Police Outpost for the purpose of lodging First Information Report. The F.I.R. was taken down by Police Jamadar Bhalabhai Punjabhai Ahir. Thereafter Police Jamadar Bhalabhai Punjabhai Ahir addressed a yadi to Police Head Constable Kantibhai for removing the injured to the hospital for the purpose of treatment. Under the circumstances, Head Constable Kantibhai removed the injured to the Primary Health Centre, Shivrajpur. At the Primary Health Centre, Dr.Rameshkumar Niranjnlal Agraval was on duty. The Medical Officer noticed that the injured had sustained deep internal injuries. He

did not take any stitches and referred the injured to SSG Hospital, Baroda. On way, the injured succumbed to his injuries. Dr.S.S.Basu, performed postmortem on the dead body of deceased Budhabhai. The Investigating Officer, recorded statements of witnesses conversant with the facts of the case. He also got prepared the panchnama of the scene of offence in presence of independent witnesses. The Investigating Officer seized incriminating articles and sent them to Analyst for obtaining necessary report. At the conclusion of investigation, the respondents were charge-sheeted under S.302 read with S.34 I.P.Code. As the offence under S.302 is exclusively triable by the Court of Sessions, the case was committed to Sessions Court for trial and was numbered as Sessions Case No. 108/84. The learned Addl. Sessions Judge, Panchmahals at Godhra, framed charge at Ex.2 against the respondents under S.302 read with S.34 I.P.Code. The charge was read over and explained to the respondents. The respondents did not plead guilty to the charge and claimed to be tried. The prosecution therefore, examined the following witnesses to prove its case:

1. Dr.S.S.Basu, PW 1, Ex. 8,
2. Chunkiben, Wd/o Budhabhai, PW 2, Ex. 10,
3. Bai Gorali Jesing Kuchala, PW 3, Ex. 11,
4. Udesinh Maganbhai Baria, PW 4, Ex. 15,
5. Vithalbhai Chhaganbhai Panchal, PW 5, Ex. 20,
6. Mohanbhai Mahasukhbhai Baria, PW 6, Ex. 22,
7. Kantibhai Shabhai Patel, PW 7, Ex. 23,
8. Bhalabhai Punjabhai Ahir, PW 8, Ex. 24,
9. Rameshchandra Shankerlal Jagtap, PW 9, Ex. 26,
10. Dr.Rameshkumar N. Agraval, PW 10, Ex. 30.

The prosecution also relied on documentary evidence such as postmortem notes, complaint filed by the deceased, report received from Forensic Science Laboratory, panchnama of the scene of offence, etc. to prove the case against the Respondents.

3. After taking into consideration the evidence led by the prosecution and hearing the parties, the learned Judge recorded the following conclusions :

- (i) The prosecution evidence proves it beyond reasonable doubt that deceased Budhabhai Chhotabhai Rathva died a homicidal death ;
- (ii) The evidence of Chunkiben, widow of deceased Budhabhai as well as the evidence of Bai

Gorali Jesing stands contradicted by the contents of the panchnama of scene of offence, and their evidence is not reliable ;

(iii) The feast was arranged at the house of the accused and therefore, it is not probable that merely because the deceased and others had got up, they would be assaulted by the accused when others were dining ;

(iv) The report prepared by Police Patel Mohanbhai Mansukh Baria is not brought on the record of the case which suggests that the prosecution has suppressed origin of the occurrence ;

(v) The Medical Officer has not noted any injury to the deceased which might have been caused by pelting of stones or by stick, and therefore, eye-witnesses Chunkiben and Bai Gorali stand contradicted ;

(vi) No explanation is offered by any of the prosecution witnesses as to why the complaint was filed on May 19, 1984 at 11.0 a.m. though the incident had taken place on May 18, 1984 at about 7.30 p.m. which casts doubt on the prosecution case ;

(vii) Prosecution has failed to prove its case against the respondents beyond reasonable doubt.

4. In view of the above referred to conclusions, the learned Judge, acquitted the respondents, giving rise to the present appeal.

5. Mr.M.A.Bukhari, learned APP has taken us through the entire evidence on record. The learned Counsel for the appellant submitted that the first information report lodged by the deceased should be treated as his dying declaration, and as the dying declaration is true and free from embellishments, the same should be relied on for the purpose of convicting the respondents. It was argued that the evidence of eye-witness Chunkiben, widow of Budha Chhota is corroborated in material particulars not only by the evidence of another eye-witness Bai Gorali Jesing, but also by medical evidence on record and therefore, the appeal deserves to be accepted. It was urged that the prosecution has proved its case beyond reasonable doubt, against the respondents and therefore, the

appeal should be allowed.

6. Mr.A.J.Patel, learned Counsel appearing for the respondents pleaded that the medical evidence does not show that the deceased had received any injuries which could have been caused by pelting of stone, or by means of stick and as material part of the dying declaration stands proved to be false, no reliance should be placed on it. It was argued on behalf of the respondents that the evidence of Chunkiben and Bai Gorali is contradicted by medical evidence on record and therefore, no error can be said to have been committed by the learned Judge in not placing reliance on their evidence. It was emphasised by the learned Counsel for the respondents that cogent and convincing reasons have been given by the learned Judge while acquitting the respondents and as two views of the matter are possible, this court should not interfere with the findings of facts recorded by the learned Judge.

7. The fact that deceased Budhabhai died a homicidal death is not in dispute. That fact is amply proved by the evidence of Dr.S.S.Basu, PW 1, Ex. 8, who performed autopsy on the dead body of Budhabhai, as well as from the contents of the postmortem notes. In the postmortem notes, the cause of death of deceased Budhabhai is mentioned to be 'shock and haemorrhage caused by multiple injuries'. Under the circumstances. the finding recorded by the learned trial Judge that Budhabhai died a homicidal death is eminently just and is hereby confirmed.

8. The submission that the dying declaration made by the deceased has proved the prosecution case against the respondents beyond reasonable doubt, and therefore, the respondents should be convicted of the offence mentioned in charge Ex. 2 cannot be accepted. In the complaint which was filed by the deceased, it was mentioned that Respondent no.1 had caused injury on his shinbone by pelting stone. Witness Chunkiben has also stated in her evidence that as injury was caused on the leg of the deceased, he had fallen down. This indicates that stone was pelted at the deceased with force. If in fact, the deceased had sustained any injury on shinbone, the same would have been noticed by Dr.Rameshkumar Agarwal, who was the Medical Officer at the Primary Health Centre, Shivrajpur, as well as by Dr.S.S.Basu, who performed autopsy on the dead body. Similarly, in the complaint filed by the deceased, it is stated that respondent no.3 had given

stick blow on the right hand of the deceased, whereas Chunkiben, widow of the deceased has stated in her sworn testimony before the court that Respondent No.3 had given three blows to the deceased by means of stick. Another eye-witness Bai Goralji Jesing has asserted in her deposition that respondent no.3 had given two blows with 'Ada' on the head of the deceased, as a result of which head of the deceased was smashed. Dr.Rameshkumar N. Agarwal, Medical Officer at the Primary Health Centre, Shivrajpur, has not stated in his evidence that he had noticed any injury either on the hand or on the head of the deceased which could have been caused by means of a stick. Similarly, Dr.Basu, who performed autopsy on the dead body of deceased Budhabhai has not stated in his evidence that any injury either on the right hand or on the head of the deceased which could have been caused by stick or Ada was noticed by him. Law relating to dying declaration is well settled. Generally, following three tests have been devised in judicial pronouncements in order to answer the question whether the dying declaration is true.

- (i) Was the victim in a position to identify the assailant/s ?
- (ii) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ? and
- (iii) Whether any material part is proved to be false by other reliable evidence ?

The F.I.R. which was lodged by the deceased and which is sought to be relied on by the prosecution as his dying declaration becomes doubtful because the version narrated by the victim is not intrinsically sound. As noted earlier, material parts of the complaint are proved to be false by other reliable evidence. It exhibits the tendency on the part of the deceased to exaggerate things and falsely implicate the accused. On close scrutiny of the dying declaration, it is evident that it was the result of tutoring, prompting and imagination. Because of the factors which have been enumerated hereinabove, the dying declaration is suspicious and it would not be safe to act upon it without corroborative evidence. It is well settled that a dying declaration which suffers from infirmity cannot form the basis of conviction and therefore, the respondents cannot be convicted of the offence mentioned in charge Ex.2, relying on the contents of

complaint which is treated as dying declaration of the deceased.

9. There are other circumstances which make it unsafe to place reliance on the complaint filed by the deceased. In the complaint, it is mentioned that the incident took place at the time when the deceased alongwith his relatives was entering his vada. But the panchnama of the scene of offence makes it abundantly clear that the incident had taken place in the field of Amara Chatra. The complaint does not mention that the deceased had gone for the purpose of dinner to the house of Chima Manji, with his wife Chunkiben or aunt Bai Gorali or his son Kanti, and that all were with him when he was returning home. Under the circumstances, the evidence of the eye-witnesses that they had witnessed the incident when they were with the deceased becomes doubtful. It is relevant to note that according to the prosecution, the complaint was lodged by the deceased on May 19, 1984 at about 11.0 a.m. whereas admittedly the incident had taken place on May 18, 1984 at about 7.30 p.m. Though the Police Patel was contacted and summoned, no explanation has been offered by any of the prosecution witnesses as to why the complaint was filed after about 16 hours of the occurrence. The deceased was not even removed to any hospital for treatment during this period. The medical evidence shows that deceased had sustained serious injuries on the vital parts of his body. Dr.Rameshchandra Agraval has stated that the deceased was brought to the Primary Health Centre, Shivrajpur at about 11.40 a.m. and the deceased was not in a position to give reply to the questions put by him. Dr.Agraval has produced the medical case papers at Ex. 31. In the medical case papers it is mentioned that the patient was semiconscious and his general condition was poor. It is also mentioned in the medical case papers that the blood pressure was not recordable, and the pulse was very feeble. Under the circumstances, a serious doubt arises as to whether the deceased himself could have gone to the Police Outpost for giving the complaint, and whether the complaint was, in fact, given by him. In view of the above discussion, we are of the opinion that no reliance can be placed on the complaint of deceased for recording conviction of the respondents.

10. This brings the court to the evidence of witnesses. Chunkiben, widow of deceased Budhabhai Chhotabhai has stated in her evidence that she was

present at the time when the respondents assaulted her deceased husband. She, in her statement has asserted that Respondent no.1 had caused injury to the deceased by pelting stone, whereas respondent no.3 had caused injuries to the deceased by means of stick. As noted earlier, medical evidence on record does not indicate that the deceased had sustained any injury which could have been caused by pelting of stone or by use of stick. Thus, medical evidence contradicts the assertion made by Chunkiben before the court. Her evidence also stands contradicted by the panchnama of the scene of offence, which indicates that the incident had taken place in the field of Chatra Amara, and not near the house of the deceased as claimed by the prosecution. The tendency on her part to exaggerate things and falsely implicate the accused is apparent when one looks to what she has stated in para 6 of her deposition. In para 6 of her deposition, she has claimed that respondent no.1 had pelted two stones at the deceased and caused injuries, whereas respondent no.3 had given three blows with stick. However, as observed earlier, she is not corroborated by any reliable evidence on record suggesting that the deceased had received injuries which could have been caused either by pelting of stone or by stick. This witness has claimed in para 8 of her deposition that when she contacted police patel, he had not made any report, whereas Bai Gorali has, in terms, stated that at the instance of Chunkiben, police Patel had come to the house of Budhabhai, where a report was prepared by the police Patel at the instance of Budhabhai, and Budhabhai had placed his thumb mark also on the report. This report is not forthcoming on the record. As the prosecution has failed to produce the report made by the police Patel, at the instance of deceased Budhabhai, an adverse inference will have to be drawn against the prosecution, and it will have to be held that the prosecution has suppressed the genesis of the occurrence. Evidence of witness Gorali is also not reliable and is full of contradictions. Cross-examination of the eye-witnesses makes it abundantly clear that deceased Budhabhai had quarrelled with several persons in the Village and had also tried to outrage the modesty of one Chaturi, wife of Reyalo. The prosecution was also relying on the statement of Chima Manji and his name was also mentioned in the charge-sheet as one of the witnesses. However, at the trial, Chima Manji was not examined as a witness. Under the circumstances, no exception can be taken to the finding recorded by the learned trial Judge that the evidence of two eye-witnesses is

unreliable and untrustworthy more particularly when it is not corroborated by other reliable evidence on record,

11. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & ORS. vs. BIJENDRA NARAIN CHAUDHARY, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Addl. Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

11. For the foregoing reasons, we do not see any merits in the appeal, and the appeal is liable to be dismissed. The appeal therefore, fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned trial Judge in the impugned judgment.

abraham*